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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. _____

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, Successor in office to LAWSON E. GLOVER and JOHN W. GOODSON, Prosecuting Attorney for the Eighth Judicial Circuit of Arkansas, ... *Appellants*

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA. ..... *Appellants and Intervenors*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS TEXAS AND PACIFIC RAILWAY COMPANY ..... *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT OF APPELLANTS

Appellants, consisting of the original defendants and the intervening brotherhoods, referred to as Prosecutors and Brotherhoods respectively, have separately appealed from the judgment entered on March 8, 1965, of a convened three-judge panel in the United States District Court for the Western District of Arkansas. This judgment was rendered on application of appellees for a summary judgment which enjoined the enforcement of Act 116, Acts of Arkansas of 1907 and Act 67, Act of Arkansas 1913. This Statement is submitted to confirm that the Supreme Court of the United States has jurisdiction of this appeal and that several substantial questions of national significance, the interest of the State of Arkansas, and the railroad industry are presented in this cause.

OPINION BELOW

Neither the majority nor the minority opinions of the District Court have been reported. The verbatum opinions and the judgment are appended to the Brotherhoods' Statement as Appendix A.

JURISDICTION

This suit was instituted by appellees pursuant to the authority of 28 U.S.C. §§1331, 1332, 2201 and 2202 attacking the validity of two enactments of the General Assembly of the State of Arkansas. These acts, in essence, established minimum railroad crew consist in certain prescribed circumstances. A three-judge court was impaneled in accordance with 28 U.S.C. § 2281. The appellees originally alleged several alternative contentions of invalidity of the Arkansas Acts but the motion for

summary judgment on which relief was granted, limited consideration to issues of supremacy of federal legislation, the commerce clause and equal protection clause of the Constitution of the United States.

On March 5, 1965, a divided court agreed that there were genuine issues of material fact as to the commerce clause and equal protection contentions, but a majority held that the Arkansas statutes had been pre-empted by the passage of Public Law 88-108. The judgment and injunction prohibiting enforcement of the Arkansas statutes was entered on March 8, 1965.

Notices of appeal were filed by the Prosecutors on April 1, 1965, and by the Brotherhoods on March 17, 1965. The jurisdiction of the Supreme Court of the United States to review the decision below by direct appeal is authorized by 28 U.S.C. § 1253. *Florida Lime Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960). Moreover, this Court has previously granted review of an almost identical case. *Missouri Railroad* v. *Norwood*, 283 Ark. 249 (1931);

QUESTIONS PRESENTED

I. Whether an actual conflict or inconsistency exists between the Arkansas Acts in controversy, enacted for the safety and protection of the people of Arkansas, and Public Law 88-108 which requires and has resulted in arbitration of labor disputes of Railroad Management and the Brotherhoods?

II. Has the Congress of the United States intended to deprive the State of Arkansas of its authority to legislate matters of safety by establishing minimum railroad crews in certain prescribed circumstances or did the

Congress of the United States by enactment of Public Law 88-108 pre-empt the State of Arkansas and responsible State officials from enforcing Act 116, Acts of Arkansas of 1907, and Act 67, Acts of Arkansas of 1913?

III. If Public Law 88-108 nullifies conflicting Arkansas Statutes or merely suspends and prohibits the enforcement of those Statutes for the duration of the national arbitration and awards pursuant to Public Law 88-108?

UNITED STATES STATUTES INVOLVED

This case involves the application of Public Law 88-108, 77 Stat. 132, 45 U.S.C. A. § 157 (Supp. 1964). This Statute is set forth in Appendix B of the Brotherhoods' Statement.

ARKANSAS STATUTES INVOLVED

This litigation also involves Act 116, Acts of Arkansas of 1907, codified as Ark. Stat. Ann. §§ 73-720 through 73-722, and Act 67, Acts of Arkansas of 1913, appearing at Ark. Stat. Ann. §§73-726 through 73-729. These Statutes are appended to the Brotherhoods' Statement in Appendix B.

STATEMENT

The history of the litigation challenging the Arkansas statutes involved here may properly be described as long and complicated. Act 116, passed in 1907, requires, in essence, that freight trains with certain exceptions shall have a minimum crew consisting of an engineer, fireman, conductor and three brakemen. This statute was unsuccessfully attacked as an unconstitutional regulation of commerce, a denial of equal protection and deprivation of property without due process. *Chicago R. I. & Pac. R. R. Co.* v. *Arkansas,* 219 U.S. 453 (1911). Act 67, enacted in 1913, with certain exceptions requires that a minimum crew of an engineer, fireman, foreman and three helpers be maintained for switching operations in cities of the first and second class. This legislation also withstood similar allegations of invalidity. *St. Louis I.M. & S. Ry.* v. *Arkansas,* 240 U.S. 518 (1916). Both of the enactments were tested again on the identical contentions and, in addition, were alleged to have been pre-emptied by the Interstate Commerce Act and the Railway Labor Act. *Missouri Pac. R. R.* v. *Norwood,* 283 U.S., 249 (1931), 290 U.S. 600 (1933).

This cause on appeal was instituted by appellees, six interstate railroads, on April 10, 1964. The complaint, consisting of twenty-four pages, alleged a varied attack on the constitutionality and application of the two Arkansas Statutes.

Again, Act 116 and Act 67 were assailed by the familiar assertions of invalidity. However, a new tact was involved. Appellees contended that the Arkansas statutes had been pre-empted by Public Law 88-108. In 1963, the United States Congress enacted this measure

to require arbitration of labor disputes and avert a national crisis. Among other things certain minimum crew consist, with exceptions, were established.

Five Brotherhoods of the railroad industry were given leave to intervene. The Brotherhoods then moved to dismiss the complaint and this application was denied. The complaint was answered and certain preliminary discovery procedures were instituted. Appellees subsequently gave notice and moved from summary judgment on the basis that Public Law 88-108 had superceded the Arkansas Statutes, that the Arkansas Statutes were discriminatory, and that the Arkansas Statutes denied appellees equal protection of the law. This motion was submitted to the Court on appellees' motion with exhibits, responses to the motion and briefs by the parties.

On March 5, 1965, the District Court rendered its decision. While each of the three judges agreed that there were substantial factual issues in controversy concerning discrimination and equal protection, two of the judges determined that Public Law 88-108 did supercede the Arkansas Statutes and awarded judgment to appellees. The third judge held that there was no conflict between the federal and state enactments and that no substantial evidence could be discovered to require pre-emption of the Arkansas Statutes by Public Law 88-108. Judgement was entered on March 8, 1965, enjoining the Prosecutors from attempting to enforce Act 116 and Act 67. An application to the District Court by the Brotherhoods to stay the injunction was unanimously denied. Subsequently, a stay was ordered by Mr. Justice Byron R. White pending the decision of this Court upon the jurisdictional aspects of this case. An effort to modify this order was denied on April 2, 1965.

Leave was granted so that the Prosecutors would not be required to comply with Rule 15 (l) (h) and (i) to append the opinion and judgment of the court below since this information appears as an appendix to the Brotherhoods' Statement.

THE QUESTIONS ARE SUBSTANTIAL

The majority opinion of the District Court is in direct conflict with the previous rulings of this Court. This may not be a literally correct and precise statement. The District Court declared the Arkansas Statutes heretofore determined by this Court to be constitutional had been pre-empted by Public Law 88-108. Although this aspect of Public Law 88-108 has not been examined by this court, an appraisal reveals the judgment of the court below to be inconsistent with the established policy and contrary to the interpretations of this Court concerning the issues involved. Cf. *Missouri Pac. R.R. Co.* v. *Norwood, supra* 283 U.S. 249 (1931), 290 U.S. 600 (1933). If the decision is permitted to stand, the authority of the General Assembly of Arkansas to legislate matters of public safety governing railroads in Arkansas has been effectively thwarted.

It is no exaggeration that the decision of the District Court has national implications. The decision will have a profound effect on the entire railroad industry in the United States.

To emphasize the magnitude of the issues involved, attention is invited to similar litigation now pending over this Nation. E.g. *Chicago, M. St. P. & Pac. R. R.* v. *Pearson,* No. 6214 (E. D. Wash.) (Rev. Code Wash. §§ 81-40.020, 81-40.030 (1951); *New York Cen. R. R.* v. *Lefkowitz,* No. 6024/1961 (Sup. St. N. Y., Westchester County) McKinney's Consol. Laws N. Y., Book 48, §§ 54-a, 54-b, 54-c (1952)); *New York Cen. R. R.* v. *Public Service Comm.,* No. S64-3643 (Marion County, Ind., Super. Ct.) (Burns Ind. Stat. Ann. §§ 55-1326 through 1338 (Repl. Vol. 1951)). Thus, the issues are not only extremely important to the State of Arkansas, but to each of the several states as well.

I

There is No Conflict Between the Arkansas Acts and Public Law 88-108.

The majority opinion of the United States District Court declared that there was an actual conflict between the Arkansas Acts in controversy and Public Law 88-108. As previously noted, it is significant that both Act 116 and Act 67 have been justified and upheld on the basis as a reasonable exercise of police power of the State of Arkansas for the safety and protection of the general public. On the other hand, Public Law 88-108 evolved from a threat of an impending national labor dispute between railroad management and the brotherhoods. Evidence supporting this fact is voluminous. Pursuant to this authority, national mediation was undertaken and in certain circumstances special boards were created to arbitrate in special areas. In every instance known to the prosecutors, the awards were directed solely to alterations of certain work rules and agreements between the parties.

The award merely established minimum crew consist. Management is not restricted in any way from enlarging upon the minimum crews. Thus, it is inconceivable that independent state legislation requiring greater minimum crew consist would be inconsistent or conflict with the arbitration awards. *Florida Line & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 at 146. It is supposed that even at this time, that occasionally because of traffic congestion, inclement weather, nature of the train load or a variety of other events may compel the railroad management to assign additional firemen or brakemen over the prescribed minimums announced by the arbitration award or the Arkansas statutory schedules. By so doing, railroad

management would not violate either the spirit or the letter of the Arkansas Statutes, or the arbitration awards.

The minority opinion of the court below observed:

> "In *Local 20* v. *Morton*, 377 U.S. 252, 258, the matter of the test to be applied when Congress has not expressly preempted the field is thus stated: 'The basic question, in other words, is whether "in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law." *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 102. The answer to that question ultimately depends upon whether the application of state law in this kind of cases would operate to frustrate the purpose of the federal legislation.' "

and then concluded:

> "While it would be inconvenient and burdensome for the railroad to comply with the state safety laws, it is possible for them to comply with both the arbitration award and the state law."

It is submitted, therefore, that the inconsistency or conflict urged by appellees and found by the United States District Court is more apparent than real and more contrived than known.

II

Public Law 88-108 Does Not Supersede the Arkansas Acts.

The lower court held that Congress, by the enactment of Public Law 88-108 purposely or effectively preempted the State of Arkansas from enforcement of Act 116 and Act 67.

It is a well settled principle of statutory construction that there is no presumption of repeal or pre-emption by implication. On the contrary, pre-emption will only be found by specific expression or where there is an actual conflict between two schemes of regulations. Neither ingredient is present in this litigation. But the majority below determined that since no statement of non-pre-emption was written in Public Law 88-108, then it must be concluded that Congress intended to supersede the State full crew laws.

In the recent case of *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), a smoke abatement ordinance was held valid against an attack that the mere existence of Federal inspection laws had pre-empted the entire field.

After determining that the Federal inspection laws covered many subjects involving the maintenance of steam vessels, but that they were not specifically directed toward the local health and safety aspect covered by such ordinance, it was stated:

> "We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. *To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. Savage* v. *Jones,* 225 U.S. 501; *Welch Co.* v. *New Hampshire,* 306 U.S. 79; *Maurer* v. *Hamilton,* 309 U.S. 598." (Emphasis added.)

It is submitted furthermore that Public Law 88-108 is clear and unambiguous. The purpose and mechanics of the national arbitration were set out in detail. Under

these circumstances, it was not proper for the District Court to search for legislative intent. Even so, the expression of members of Congress during the consideration of the Joint Resolution, with few exceptions, is consistent with the language of the act that State minimum crew laws were not to be disturbed.

The provision of Public Law 88-108 that arbitration shall only extend for a defined period of two years lends much credit to the Prosecutors' contention that there was no intention by the Congress of the United States to infringe upon existing authority of States to enact minimum crew consist.

III

Duration of Public Law 88-108

By the specific terms of the Joint Resolution, it is to expire within two years. Public Law 88-108 § 4. There is grave doubt, if an actual conflict exists, as to whether Public Law 88-108 merely suspends enforcement of Acts 67 and 116 for the duration of the national award or nullifies completely the conflicting Arkansas Statutes.

There is authority to support the revival of a suspended statute . 1 *Southerland Statutory Construction*, § 2027. The decision of the District Court arrived at a different conclusion and held, despite the language of Congress to the contrary, that "we cannot believe that Congress intended to allow a return of the confusion and chaos that impelled it to act . . . . "

The holding of the District Court is lacking in both law and fact. Courts should not look to the wisdom or expediency of the legislation, but should confine review to the narrow constitutional issue. *Beauharnais* v. *Illinois*, 343 U.S. 250 (1951).

CONCLUSION

It is submitted that the majority of the District Court erred by failing to properly apply the guides and pronouncements of this Court.

The questions involved in this course are of such magnitude that review should be granted.
April 13, 1965.

Respectfully submitted,
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